# Keliment anak Nyapong & Ors (suing for themselves and their parents and other siblings) v Usha Bina Sdn Bhd

HIGH COURT (SIBU) — SUIT NO 22–37 OF 2005
HAMID SULTAN JC
3 SEPTEMBER 2008

*Contract — Agreement — Nature of — Agreement to stifle criminal prosecution — Whether such agreement legally enforceable*

*Land Law — Customary land — Right to — Plaintiffs relying on native court's decision to assert native customary rights over land — Defendants without any title or interest opposing plaintiffs' claim — Whether defendants' opposition of any significance*

The plaintiffs claimed native customary rights ('NCR') over a certain area of land ('the land') identified in their statement of claim. The plaintiffs relied on a native court decision where the plaintiffs were found to be the lawful owners of the said land. They alleged that the defendants and/or its agents had trespassed onto the said land by constructing a logging road through the land without the plaintiffs' consent or approval. The plaintiffs alleged damages and loss and sought injunctive relief against the defendants. The defendants disputed that the plaintiffs had acquired native customary rights over the land. It was further argued that the native court had no power and/or jurisdiction to make any declaration that the plaintiffs were the owners of the land. The defendants further alleged that the plaintiffs were estopped from pursuing their legal action pursuant to a written memorandum of undertaking dated 11 June 2004 duly executed by the plaintiffs. The memorandum provided, inter alia: (i) that the plaintiffs would not demand any compensation whatsoever against the defendants with regard to the said land until the plaintiffs' claim as native customary right owners over the said land had been verified and approved by the relevant authority; (ii) that the defendants or its agents would withhold criminal charges or civil claims against the plaintiffs for damage caused by the plaintiffs and/or their agents to two Caterpillar bulldozers belonging to the defendants; and (iii) in the event the plaintiffs breached any of their undertakings in the memorandum, the defendants would have the right to claim damages in respect of the damage occasioned to its two Caterpillar bulldozers. The defendants

commenced a counterclaim against the plaintiffs for the loss suffered due to its damaged bulldozers.

**Held**, allowing the plaintiffs' claim in part and dismissing the defendants' counterclaim with costs:

(1) The defendants in this case had no title or interest in the land to resist the claim of the plaintiffs who were natives of Sarawak, and had their rights to the land recognised by the native courts. The fact that the order of the native court had not been translated did not have much significance when the defendants had no interest in the said land and was in fact occupying the land in breach of the Sarawak Land Code (see para 8(i)).

(2) Assessment of damages for trespass ought to be allowed and assessed by the deputy registrar, together with the appropriate interest. The plaintiffs and the defendants ought to submit proper assessors' or valuers' reports to the registrar to assist him to decide the quantum of damages (see para 8(iii)).

(3) Considering that the defendants had no legal right or basis to be on the land and the fact the plaintiffs had a superior title to the said land, a mandatory injunction would be in order (see para 8(iv)).

(4) It was wrong for the defendants to enter into the said memorandum of understanding with a term not to prosecute criminal proceedings. A memorandum of understanding used to stifle criminal proceedings is not enforceable in law (see paras 8(v)–9).

**[Bahasa Malaysia summary**

Plaintif-plaintif menuntut hak-hak adat anak negeri ('HAAN') ke atas kawasan tanah tertentu ('tanah tersebut') yang dikenalpasti dalam penyataan tuntutan mereka. Plaintif-plaintif bergantung kepada keputusan mahkamah anak negeri di mana plaintif-plaintif didapati pemilik sah tanah tersebut. Mereka mengatakan defendan-defendan dan/atau agennya telah menceroboh ke dalam tanah tersebut dengan membina jalan pembalakan melalui tanah tersebut tanpa persetujuan atau kebenaran plaintif-plaintif. Plaintif-plaintif telah mengatakan ganti rugi dan kerugian dan memohon relief injunksi terhadap defendan-defendan. Defendan-defendan telah mempertikaikan bahawa plaintif-plaintif telah memperoleh hak-hak adat anak negeri ke atas tanah tersebut. Ia juga dihujahkan bahawa mahkamah anak negeri tiada kuasa dan/atau bidang kuasa untuk membuat apa-apa deklarasi yang plaintif-plaintif adalah pemilik-pemilik tanah tersebut. Defendan-defendan selanjutnya mengatakan bahawa plaintif-plaintif diestopkan daripada

meneruskan tindakan undang-undang mereka menurut memorandum persefahaman bertulis bertarikh 11 Jun 2004 yang telah disempurnakan oleh plaintif-plaintif. Memorandum itu memperuntukkan, antara lain: (i) bahawa plaintif-plaintif tidak akan menuntut apa-apa pampasan terhadap defendan-defendan berkaitan tanah tersebut sehingga tuntutan plaintif-plaintif sebagai pemilik-pemilik hak-hak adat anak negeri ke atas tanah tersebut telah disahkan dan diluluskan oleh pihak berkuasa yang berkaitan; (ii) bahawa defendan-defendan atau agennya tidak akan membuat pertuduhan jenayah atau sivil terhadap plaintif-plaintif untuk kerosakan yang disebabkan oleh plaintif-plaintif dan/atau agen mereka ke atas dua jentolak Caterpillar milik defendan-defendan; dan (iii) sekiranya plaintif-plaintif melanggar apa-apa aku janji mereka dalam memorandum itu, defendan-defendan mempunyai hak untuk menuntut ganti rugi berkaitan kerosakan terhadap dua jentolak Caterpillarnya. Defendan-defendan telah memulakan tuntutan balas terhadap plaintif-plaintif untuk kerugian yang dialami terhadap jentolak-jentolaknya yang rosak.

**Diputuskan**, membenarkan sebahagian daripada tuntutan plaintif-plaintif dan menolak tuntutan balas defendan-defendan dengan kos:

(1) Defendan-defendan dalam kes ini tidak mempunyai hak milik atau kepentingan dalam tanah tersebut untuk menghalang tuntutan plaintif-plaintif yang merupakan anak negeri Sarawak, dan yang mempunyai hak-hak mereka ke atas tanah tersebut yang dikenali oleh mahkamah anak negeri. Hakikat bahawa perintah mahkamah anak negeri tidak diterjemahkan tidak begitu penting di mana defendan-defendan tiada kepentingan dalam tanah tersebut dan pada hakikatnya dengan mendiami tanah tersebut telah melanggar Kanun Tanah Sarawak (lihat perenggan 8(i)).

(2) Penaksiran ganti rugi kerana pencerobohan patut dibenarkan dan ditaksirkan oleh timbalan pendaftar, bersama dengan faedah yang bersesuaian. Plaintif-plaintif dan defendan-defendan patut mengemukakan laporan penaksir atau penilai yang betul kepada pendaftar untuk membantunya memutuskan kuantum ganti rugi (lihat perenggan 8(iii)).

(3) Dengan mengambilkira bahawa defendan-defendan tiada hak sah atau asas untuk berada atas tanah tersebut dan hakikat yang plaintif-plaintif mempunyai hak milik unggul ke atas tanah tersebut, injunksi mandatori patut diberikan (lihat perenggan 8(iv)).

(4) Adalah salah untuk defendan-defendan memasuki memorandum persefahaman tersebut dengan terma untuk tidak membuat dakwaan prosiding jenayah. Suatu memorandum persefahaman digunakan

untuk menyekat prosiding jenayah tidak boleh dikuatkuasakan dari segi undang-undang (lihat perenggan 8(v)–9).]

**Notes**

For a case on nature of agreement, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2430.

For cases on right to customary land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2710–2711.

**Cases referred to**

*Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands & Surveys Kuching Division & Ors* [2008] 4 MLJ 415, HC (refd)

*Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla* [1999] 2 MLJ 567, HC (refd)

*Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224, SC (refd)

**Legislation referred to**

Rules of the High Court 1980 O 92 r 1
Sarawak Land Code

*Baru Bian (Baru Bian Advocates) for the plaintiffs.*
*Louis Achuk (Kadir Wong Lin & Co) for the defendant.*

**Hamid Sultan JC:**

**[1]** This is my judgment in respect of the plaintiffs' (Iban native of Sarawak) claim against the defendants' for trespass and seeking injunctive relief damages etc, and the defendants' counterclaim for damages to two of the vehicles.

**[2]** At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness

statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS

**[3]** The plaintiffs' claim that at all material times they have created, acquired and/or inherited native customary rights ('NCR') over that area of land shaded in orange in the map marked 'A' attached with their statement of claim ('the said land') which is located on the left bank of Balleh River (as one proceeds upriver), in between two streams locally referred to as Sungei Selegup and Sungei Ujung Tanju, with an area of approximately 21 land, the plaintiffs say that they will refer and rely in this trial on a native court decision at Kapit, under reference No CIKPT/05/2004(c) given on 20 September 2005, where the plaintiffs were found to be the lawful owners of the said land.

ALLEGATION OF TRESPASS BY THE DEFENDANTS

**[4]** The plaintiffs' action is based on trespass alleged to have been committed by the defendants and/or its agents, named Mok Yin Kiang, sometime in June 2004. The alleged act of trespass onto the said land by the defendants was the construction of a logging road passing through the said land without the plaintiffs' consent or approval and as such the plaintiffs suffered damages and loss as a consequence of the defendants' alleged trespass. The particulars of loss and damages are as follows: (i) many rubber trees had been destroyed; (ii) about two acres had been destroyed for the use of the said logging road for a distance of about 1/3km; and (iii) loss of income from the said rubber trees which were destroyed. The plaintiffs' claim for the said loss and damages to be assessed before the registrar.

**[5]** The defendants dispute that: (i) the plaintiffs had acquired native customary rights; (ii) the native court has no power and/or jurisdiction to make any declaration that the plaintiffs are the owners of the land; (iii) the action is bad in law as both the defendants and the state government were not called as parties in the said native court proceedings; (iv) there is no evidence that the plaintiffs are the native customary right holders or legal owners of the said land; (v) the defendants are not aware of any rubber trees alleged to be owned by the plaintiffs and destroyed by the defendants due to the construction of the said logging road; (vi) the said logging road which was constructed by the defendants in fact, did not encroach on the land allegedly belonging to the plaintiffs. The plaintiffs had refused to conduct a joint inspection with the defendants to identify the alleged encroachment of the plaintiffs' land; (vii) in any event, even if the said logging road had encroached on the said land (which is strongly denied), the plaintiffs are

estopped from proceeding with the present legal action against the defendant as by a written memorandum of undertaking dated 11 June 2004 duly signed by the plaintiffs, wherein the plaintiffs had agreed, inter alia, that they shall not press or demand for any payment whatsoever against the defendants in regards to the said land unless and until the plaintiffs' claim for the said land as native customary right owners has been verified and approved by the relevant authority. Up to date, there is no verification or approval made by the State Government of Sarawak for such matter; (viii) in view of the above, the plaintiffs' action thereof is in fact premature and ought to be dismissed by the court. In respect of the counterclaim, the defendants say: (i) the plaintiffs have deliberately and maliciously caused damage to the said two Caterpillars; (ii) the defendants had lodged a police report No 812/04 at the Police Station at Kapit with regard to the above matter; (iii) the plaintiffs had admitted to the above damages inflicted on the said two Caterpillars and subsequently duly signed a written memorandum of undertaking to the defendants dated 11 June 2004, inter alia, on the following:

(a) that the plaintiffs shall not disrupt access to the defendants, its workers and agents to the area connecting to the logging place.

(b) that the plaintiffs shall not press for or demand for any compensation for the said land until the plaintiffs or any of their individual claim to the said land as native customary right owner has been verified and approved by the relevant authority.

(c) that if the plaintiffs shall be in breach of any of the above promise and undertaking stated in the said memorandum of undertaking, the defendants shall have the right to claim for damages to the said two Caterpillars and damages for loss of earnings from the plaintiffs. In breach of the said memorandum of undertaking, the plaintiffs after the signing of the said memorandum of undertaking, are now in the present action claiming for damages as regard to the said land and further applying for an order from the court for the defendants to vacate the said land without having their claim on the said land as native customary right verified or approved by the State Government of Sarawak. That, based on the said memorandum of undertaking, the plaintiffs are estopped from filing the present action against the defendant. The said two Caterpillars are worth RM235,000 each and the loss suffered by the defendants due to the damages to the said two Caterpillars are in the sum of RM470,000. Whereby the defendants claim against the plaintiffs, jointly and/or severally for:

(i) the sum of RM470,000;

(ii) damages to be assessed by the registrar for loss of usage of the said two Caterpillars;

(iii) costs; etc.

PRELIMINARIES

**[6]** One witness gave evidence for the plaintiffs and two witnesses for the defendants. Though the defendants resist the claim of the plaintiffs, the defendants do not show what interest he has in the said land, where title has not been issued and it is trite that the said land is a state land pursuant to Sarawak Land Code ('SLC'). The defendants who are not a native per se could not in law have acquired any interest by lease or rent or otherwise the Land Code. I have dealt with this matter extensively in the case of *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands & Surveys Kuching Division & Ors* [2008] 4 MLJ 415). I do not wish to repeat the relevant parts, save to say that this judgment must be read with that judgment for the purpose of ascertaining whether the defendants' could have any interest in the land belonging to the state and to resist the claim when per se the defendant's entry to the land is illegal and or cannot be entertained by the court. In this case, the defendants say that they are in the land pursuant to a rental agreement.

THE DEFENDANTS' ARGUMENT

**[7]** Learned counsel for the defendants, inter alia, in the submission says that: (i)(a) at the first instance, the plaintiffs had even failed to show to the court the exact location of the said purported land, (b) even if the plaintiffs are able to show the exact location of the said purported land, the plaintiffs failed to prove the continuous occupation of the purported land, which would entitle them to the native customary right, (c) apart from the said self serving testimony of bare allegation on the existence of the rubber trees on a piece of land which location is not known and with no proof of the native customary right as aforesaid, there is also no corroborative evidence such as a survey map plan prepared by a qualified surveyor who had properly surveyed the purported alleged land to confirm the location of the purported land and the proof of any cultivation on the purported land, (d) there is even no photograph produced by the plaintiffs to proof or support their case on location of the alleged land or the existence of any rubber trees on the alleged land or the road allegedly constructed by the defendants on the plaintiffs' alleged land and the alleged damages on the said alleged land, (e) the plaintiffs can even allege that there is a gold mine in the said purported land but then they must prove the same with credible evidence; (ii)(a) the said document is inadmissible for contravention of O 92 r 1 of the Rules of the High Court 1980, (b) the said documents do not show the exact location of the alleged land as stated in para 3 of the statement of claim, (c) the said documents do not even prove that the subject matter in the said native court decision is in

fact the said alleged purported land as stated in para 3 of the statement of claim, (d) the *Surat Penerang* relied on by the plaintiffs cannot be used to support the plaintiffs' action as Langa ak Sandah clearly does not have the authority or power to confirm ownership of any land in Kapit, as belonging to the plaintiffs. Furthermore, the land mentioned in the Surat Penerang is different from the alleged land mentioned in para 3 of the statement of claim, (e) that based on the record of the District Office, Kapit the plaintiffs are not the owners of the land where the defendants were doing their construction works, (f) that apart from the self serving testimony of Nyangon ak Japong as regard to the said native court decision, there is no further evidence by any independent person to corroborate the allegation by him.

**[8]** I have heard the evidence, read the documents and submissions of the parties in detail. I take the view the plaintiffs' claim must be allowed in part and the defendants' counterclaim must be dismissed. My reasons are as follows:

(i) The defendants in this case have no title or interest in the said land to resist the claim of the plaintiffs who are natives of Sarawak, recognised by the native courts and the land in dispute has been identified as one which the plaintiffs have a right to by the native court. I do not see any valid reasons in law to dispute the evidence of the plaintiffs on this issue. The fact that the order of the native court has not been translated has not much significance when the defendants have no interest in the said land in dispute and more so when their occupation as I have said earlier is in breach of SLC.

(ii) I also accept the evidence of the plaintiffs in respect of the area as identified in the statement of claim as well as those areas marked and shaded in orange in the map marked 'A' as attached in the statement of claim, for the purpose of the claim against the defendants as well as any other trespassers except the state, unless the plaintiffs secure a proper survey according to law with the state authorities, for example as recommended in Secretarial Circular No 12/1939 to demarcate the area as per the native courts judgment in case No CC/KPT/05/2004(c) given on 20 September 2004, with the aid of the native court's official as far as possible or seek necessary orders against the state in a separate action to demarcate as per the native court's judgment.

(iii) I am satisfied from the evidence of the plaintiffs that an order of assessment of damages for trespass must be allowed and to be assessed by the deputy registrar as prayed. For the purpose of the assessment, I direct the plaintiffs and the defendants to submit proper assessors or valuers, report to the registrar to assist him to decide the quantum of damages and upon assessing damages, to award interest at 8%pa from

6 June 2004, the date of trespass, until the date of judgment and 8%pa from the date of judgment to the date of realisation.

(iv) For the reasons stated above, and taking into consideration that the defendants have no legal right or basis to be in the state land and the fact the plaintiffs, as it stands have a superior title to the said land, a mandatory injunction as prayed will be in order. I hereby grant the mandatory injunction as prayed in respect of the said land and parties to settle the said order before the deputy registrar.

(v) In respect of the defendants' counterclaim, I take the view it was wrong for the defendants to enter into the said memorandum of understanding with a term not to prosecute criminal proceedings. The said memorandum, inter alia, reads as follows:

> IN CONSIDERATION of you or your agents or sub-contractors or workers agreeing to withhold criminal charges or civil claims against us or any of us for damages caused to two Caterpillar D6D LS bulldozers in the said area DO HEREBY COLLECTIVELY OR INDIVIDUALLY AGREE that we individually or collectively will not henceforth disrupt access to the whole area on the plan annexed hereto marked 'A' (the said area) by USHA BINA SDN BHD, its workers or agents or its subcontractor, their workers and agents for activities connected with the timber logging operation in the area.
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> WE FURTHER A GREE COLLECTIVELY OR INDIVIDUALLY that we will not press for or demand for any "sagu hati" for the said area until our or any of our individual claim to the said area as native customary right owner has been verified and approved by the relevant authority.
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> WE COLLECTIVELY OR INDIVIDUALLY AGREE that if we shall be in breach of any of our promise and undertaking herein USHA BINA SDN BHD or its subcontractors, their workers and agents shall have the right to resume criminal charges against any of us and to claim for damages to the said two Caterpillar D6D LS bulldozers and damages for loss of earnings.

**[9]** The said memorandum of understanding when used to stifle criminal proceedings is not enforceable in law. Support for the proposition is found in a number of cases (see *Ooi Kiah Inn Charles & Anor v Kukuh Maju Industries Sdn Bhd (formerly known as Pembinaan Muncul Hebat Sdn Bhd)* [1993] 2 MLJ 224, *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla* [1999] 2 MLJ 567). The learned author Pollock & Mulla on *Indian Contract and Specific Relief Acts* (10th Ed) states as follows:

> Agreements for stifling prosecutions are a well-known class of those which the courts refuse to enforce on this ground. The principle is 'that you shall not make a trade of a felony', or, as it was expressed in a Calcutta case, 'no court of law can countenance or give effect to an agreement which attempts to take the administrative of law out of the hands of the judges and put it in the hands of private individuals'. In England the compromise of any public offence is illegal. If

the accused person is 'Innocent, the law abuse for the purpose of extortion; if guilty, the law (is) eluded by a corrupt compromise screening the criminal for a bribe'. It is not necessary to prove that there was any express threat of prosecution if the transaction in fact amounted to a bargain not to prosecute, and if court thinks the defence of illegality a disreputable one to raise in the circumstances, the only way in which it can give effect to its opinion is in dealing with the costs. But the English common law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, if such a contract is permitted by the law of that country, and this whether the contract is entered into there or in British territory. A suit would, therefore, lie in British India on a bond passed to the plaintiff in consideration of his withdrawing a prosecution for theft instituted in the French Court at Pondicherry, the agreement being permissible by the French law. It would have been difficult, indeed, to hold that the compromise of a French law suit in a manner allowed by French law could have been injurious to the administration of justice in British India.

**[10]** For reasons stated above, I dismiss the defendants' counterclaim with costs.

**[11]** I hereby order so.

*Plaintiff's claim allowed in part and defendants' counterclaim dismissed with costs.*

Reported by Andrew Christopher Simon